UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

THOMAS W.S. RICHEY, Plaintiff, v. J. AIYEKU, Defendant.	NO: 16-CV-5047-RMP ORDER ADOPTING R&R AND GRANTING PLAINTIFF'S PARTIAL SUMMARY JUDGMENT MOTION AND DENYING DEFENDANT'S SUMMARY JUDGMENT MOTION

BEFORE THE COURT is Magistrate Judge John Rodgers' January 27, 2017, Report and Recommendation ("R&R"), **ECF No. 54**, to grant Plaintiff's Motion for Partial Summary Judgment, **ECF No. 41**, deny Defendant's Motion for Summary Judgment, **ECF No. 42**, and determine the amount of damages. Plaintiff is proceeding *pro se*. Defendant is represented by Washington State Assistant Attorneys General Candie M. Dibble and Haley Christine Beach.

The Court has reviewed the R&R, ECF No. 54; Defendant's objection, ECF No. 56; the parties' submissions regarding the cross-motions for summary

judgment, ECF Nos. 41, 42, 43, 44, 45, 47, 50, 51, and 53; the remaining record; the relevant legal authority and is fully informed. The Court notes that Plaintiff did not respond to Defendant's objection or offer any objection of his own.

Background

This case concerns Plaintiff's experience with the Washington Offender Grievance Program (OGP) during his time as an inmate in the Washington State Penitentiary (WSP) in Walla Walla, Washington. Defendant Joni Aiyeku is Grievance Coordinator at WSP; her role includes processing inmate grievances according to the OGP Manual and Washington Department of Corrections Policy 550.100. ECF No. 43 at 2, 8. Inmates are expected to state their grievance as a "simple, straight-forward statement of concern," ECF No. 43 at 5, and are instructed to rewrite grievances that suffer any of a variety of issues, such as containing derogatory or abusive language toward staff.

Plaintiff submitted 25 grievances between November 2015 and March 2016 that are at issue for purposes of his complaint before this Court. Many, but not all, of Plaintiff's grievances contained insulting and derogatory language describing the correctional staff about whose behavior Plaintiff was complaining. With respect to each grievance, Defendant instructed Plaintiff to rewrite the grievance to remove the offensive language. Plaintiff declined to remove the language each time, and Defendant administratively withdrew all of Plaintiff's resubmitted

grievances. Plaintiff sued Defendant Aiyeku in her personal capacity under 28 U.S.C. § 1983, for violating his First Amendment right to petition the government for redress of grievances and to be free from retaliation for doing so.

Analysis

Defendant objects to the R&R on the basis that the Magistrate Judge incorrectly applies the Ninth Circuit's holding in *Bradley v. Hall*, 64 F.3d 1276, 1281-82 (9th Cir. 1995), a case that Defendant argues should be distinguished on its facts. In *Bradley*, the Ninth Circuit found that a prison had unconstitutionally chilled a prisoner's right of petition when it disciplined a prisoner for statements in his grievance that the prison determined violated state prison "disrespect" rules. 64 F.3d at 1278. Defendant contends that the Ninth Circuit in *Bradley* was concerned with an "absolute prohibition on disrespectful language" in grievances and the possibility of punishment for traversing a "hazy line between the 'unabashed airing of a grievance' and 'hostile [. . . or] abusive' language." ECF No. 56 at 8-9 (quoting *Bradley*, 64 F.3d at 1281).

Defendant's attempt to portray *Bradley*'s holding as inapplicable when a prison has not infracted an inmate for using abusive language is unconvincing. Defendant refers the Court to an unpublished decision, *Clark v. Woodford*, 36 Fed. Appx. 240, 2002 WL 460373 (9th Cir. 2002), in which the Ninth Circuit concluded that requiring the removal of unessential profanity and offensive language before

processing a grievance was not a "punishment" that constituted an "exaggerated response to prison concerns," as the infraction had been in *Bradley*. 36 Fed. Appx. at 241.

The unpublished *Clark* decision makes only bare references to the underlying facts, and the decision revolves around an issue not before the Court in the present case: whether the *Clark* plaintiff failed to exhaust the administrative remedies available to him. *See* 36 Fed. Appx. at 241. Moreover, the Ninth Circuit published a decision seven years after *Clark* that undermined the materiality of any distinction drawn by *Clark* between infracting an inmate for offensive language in a grievance and censoring or attempting to censor an inmate's language in a grievance.

In *Broadheim v. Cry*, 584 F.3d 1262, 1271 (9th Cir. 2009), the Ninth Circuit stressed that "disrespectful language is itself protected activity under the First Amendment," and concluded that even warning a prisoner in a manner that objectively would create apprehension of punishment or adverse regulatory action could constitute adverse action for a prisoner's retaliation claim. Here, Defendant administratively terminated all 25 of Plaintiff's grievances, some of which did not even contain derogatory language.

Defendant further contends that the Magistrate Judge misinterprets the Ninth Circuit's unpublished decision in Plaintiff's case out of the Western District of

Washington, *Richey v. Dahne*, 624 F. App'x 525, 526 (9th Cir. 2015), in which the circuit court determined that Richey had pleaded sufficient facts stating a colorable claim to survive a motion to dismiss. The Court finds that the Ninth Circuit's unpublished decision is persuasively on point, despite the fact that it was reviewing a decision on a motion to dismiss rather than a motion for summary judgment. Namely, the decision concerned the same plaintiff suing a staff member at a different detention facility for administratively terminating a grievance that plaintiff had filed, and, under those circumstances, the Ninth Circuit explicitly rejected Defendant's argument that directing Richey to rewrite his grievance fell short of the "punishment" prohibited by *Bradley*. 624 Fed. Appx. at 525.

In the remainder of Defendant's objection to the R&R, Defendant reiterates its arguments that "Aiyeku should prevail as a matter of law because asking Richey to remove derogatory, name calling from his grievances does not amount to punishment and maintains the integrity of the grievance program by focusing on the actual merits of an inmate's complaint." ECF No. 56 at 2. Defendant also repeated her arguments regarding qualified immunity. ECF No. 56 at 20-22.

Defendant's arguments are sufficiently addressed in the R&R. Therefore, the Court declines to reanalyze them here except to add that the Court concludes that Defendant's argument that requiring inmates to rewrite grievances is not punishment amounts to a distinction without a difference with respect to whether

the action unreasonably infringes upon the inmate's First Amendment rights. The record reflects that Defendant took adverse action against Plaintiff based on the content of his grievances, which conflicts with the clearly established law embodied in the holdings of *Bradley*, 64 F.3d at 1281, and *Brodheim*, 584 F.3d at 1269-73.

Accordingly, **IT IS HEREBY ORDERED** that the Report and Recommendation, **ECF No. 54**, is **ADOPTED in its entirety**. The Court will arrange a telephonic conference to set a schedule for resolving the outstanding issue of the appropriate remedy and/or damages.

The District Court Clerk is directed to enter this Order and provide copies to Plaintiff and counsel.

DATED March 14, 2017.

s/ Rosanna Malouf Peterson
ROSANNA MALOUF PETERSON
United States District Judge